United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

990

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,009

MARY T. O'DONOGHUE,

Appellant,

v.

JOSEPH W. CRAWFORD,

Appellee.

Appeal from the United States District Court
for the District of Columbia

DENNIS COLLINS

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QUESTION PRESENTED ON APPEAL

The question is whether, in a case where Appellee's automobile was driven by a co-defendant into the rear of another automobile, thereby causing personal injury to this Appellant, evidence that Appellee's brakes failed, that the brake linings on his automobile were worn out, and that this condition is a gradual one manifested by the brake pedal going lower and lower, was sufficient to establish a *prima facie* case of negligence against Appellee rather than granting him a directed verdict at the close of Appellant's case in chief.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. Jurisdiction is vested in this Court by virtue of 28 U.S.C.A. §1291.

PRELIMINARY STATEMENT

Appellant filed suit against two concurrent tort-feasors. The trial Court directed a verdict in favor of the Appellee herein at the close of Appellant's case in chief. That trial ended in a mis-trial due to a hung jury and in a second trial against the remaining defendant, Appellant obtained a verdict and judgment satisfactory to her. That judgment has been appealed from in Appeal No. 21,007.

This Appellant contends that it was error to direct this Appellee out of the first trial but that the net effect of that error at this time is limited to the question of contribution between the two defendants in the original action. If this Appellant's judgment is affirmed in Appeal No. 21,007, she will dismiss this appeal. If it is not affirmed, however, and a new trial is ordered, she is prosecuting this appeal on the grounds that any new trial affecting her judgment in Appeal No. 21,007 must, in justice, be among all the original parties.

STATEMENT OF THE CASE

Appellant was injured while seated in her automobile when it was struck from the rear by another automobile which had, in turn, been struck by an automobile owned by Appellee and being operated by a garage employee who was bringing it down a ramp in the garage. Said employee testified that the brakes failed. (JA 8;9)

A mechanic who examined the vehicle several days later testified that the brake linings were completely worn out. (JA 15,16,17) He stated that this is a condition which results from long periods of daily use, rather than as a result of a sudden happening. (JA 21) He testified that as the brake linings become more and more worn, the brake pedal goes lower toward the floor, when depressed.

(JA 17,18). He testified that with the condition of the brakes in Appelle's car, one would have to depress the brake pedal all the way to the floor. (JA 18) He stated further that these brakes, in their condition, would produce a rasping sound, (JA 18) that these brakes were subject to intermittent brake failure (JA 19) and would probably not operate at five to seven miles per hour going downhill. (JA 20)

The Court directed a verdict in favor of Appellee.

STATEMENT OF POINTS

There was credible evidence from which the jury could have found that Appellee's brakes were in a dangerously defective condition which should have been known to him, and it was error to direct a verdict in his favor at the close of Appellant's case in the face of this evidence.

ARGUMENT

The evidence in this case can be summarized as follows: (a) The brakes failed on Appellee's car; (b) said brakes were defective, in that the linings were completely worn away; (c) Appellee should have been aware of the condition of his brakes, since the wearing-away process occurs over a period of daily use, and as it progresses, the brake pedal goes lower and lower toward the floor. In this case, the pedal went completely to the floor, and also, the brakes produced a rasping sound.

CONCLUSION

Appellant contends that it was clearly error to rule that a *prima facie* case was not made out against Appellee on the foregoing evidentiary facts. However, this error does not in any way affect the judgment

she subsequently obtained against the co-defendant, Kinney (Appellant in Appeals No. 21,006 and No. 21,007). If this Court sees fit to affirm her judgment in Appeal No. 21,007, then the effect of the error urged above is relevant only to the question of contribution or indemnification between the two original defendants.

Respectfully submitted,

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BRIEF FOR APPELLEE, JOSEPH W. CRAWFORD,
SUBMITTED UNDER RULE 18(d)

United States Court of Appeals

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Appellee.

Appeal from the United States District Court
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STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee, the question is, was there sufficient evidence presented by Appellant to require the Court to submit to the jury Appellants' contention that the brakes on Appellee's vehicle were defective and that Appellee knew of this condition prior to delivery of his vehicle to a parking garage operator or that he should have known of that condition prior to delivery of the vehicle to the parking garage operator.

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BRIEF FOR APPELLEE
SUBMITTED UNDER RULE 18(d)

PRELIMINARY STATEMENT

Appellant was one of Plaintiffs below in an action brought against Appellee, the owner of an automobile, and a second Defendant, Kinney of D. C., Inc., the owner-operator of a parking

garage, for injuries and damages alleged to have been sustained by Appellant in an accident which occurred within the garage premises of Kinney of D. C., Inc. when Appellee's vehicle was being operated by an employee of the said Kinney within the scope and course of his employment. Appellant contended that the garage owner-operator was negligent in the operation of the vehicle and/or that Appellee was guilty of negligence in that he knew, or should have known, that his vehicle, delivered into the care and custody of the garage owner-operator, had defective brakes. The case was tried before a Court and jury and, at the conclusion of Appellants' case (and that of Appellants, Frosene Foster and Sidney Foster, No. 21,008), the trial Court directed a verdict in favor of Appellee. The trial continued and the Court subsequently directed a verdict in favor of Appellee on the crossclaim of the garage owner-operator, Kinney of D. C., Inc., against this Appellee. (See Appeal No. 21,006, Kinney of D. C., Inc. v. Frosene Foster, *et al.*, and Appeal No. 21,007, Kinney of D. C., Inc. v. O'Donoghue, *et al.*) Ultimately, the issues between Appellant and the then-remaining Defendant, Kinney of D. C., Inc., were submitted to a jury. The jury was unable to arrive at a verdict and a mistrial was declared. Subsequently, Appellant's action, and, also, the action of Appellants Foster, again came to trial before a Court and jury, in which trial, Appellee was not a party, and this Appellant and the Appellants, Frosene Foster and Sidney Foster, obtained substantial judgments against Kinney of D. C., Inc. (See Kinney of D. C., Inc. v. Frosene Foster, *et al.*, No. 21,006, and Kinney of D. C., Inc. v. O'Donoghue, *et al.*, No. 21,007) Appellant, as well as Appellants, Frosene Foster and Sidney Foster, now appeals from the direction of the verdict in favor of Appellee in the first trial as a protective measure only in the event that this Court

should reverse the judgment obtained by her against Kinney of D. C., Inc., the subject matter of the appeals brought by Kinney of D. C., Inc. in Nos. 21,006 and 21,007.

COUNTER-STATEMENT OF THE CASE

During the course of the presentation of Appellant's case, the Appellant, Frosene Foster, testified that just prior to the happening of the accident, and while she was seated in her automobile, she looked over her right shoulder and saw the vehicle (of Appellee) coming toward her; that it was travelling rapidly and that when she saw it, it was very close upon her and it was coming down the ramp fast. It was travelling much faster than 5-7 miles per hour (J.A. 6). Mrs. Foster also testified that before leaving the garage premises, the owner of the automobile that had collided with hers, Appellee Crawford, was identified to her and she heard him say that his brakes were good (J.A. 7).

The garage employee, Charles L. Blow, who was called as a witness on behalf of Appellant, described his duties as that of a parking lot attendant, explaining that vehicles delivered for parking would be taken from the ground floor to other floors within the building and there parked by the attendants (J.A. 7). On November 11, 1960, he was the attendant who was given the ticket to obtain a 1957 Pontiac owned by Appellee and he caught a conveyor belt up to the third floor and went to stall #302 where the car was parked (J.A. 8). He got behind the wheel of the car, let the handbrake off, put the car into gear and pulled forward and, at that time, he said the car had good brakes

(J.A. 8). After pulling out of the stall and starting towards the point of delivery with the car, he met another vehicle coming up the ramp and he had to stop and back up the car and then, after this car passed, he proceeded on down and, just as he arrived at the second floor, the brakes failed (J.A. 8); that as he travelled from the third to the second floor, he was applying the brakes and that they were operating (J.A. 8). He described the brake failure as consisting of the brake pedal going all the way to the floor and that he tried to pull up the pedal with the corner of his toe and succeeded in doing so and pumped the brake several times but that it went back to the floor; that he also pushed the foot brake and that this seemed to twist the motor or something and that the accelerator stuck and that he started blowing the horn and then he ran into a wall purposely, bounced off the wall, and struck against a Mercury automobile that was waiting to be taken up the ramp and then bounced off the Mercury and struck the car of Appellant (J.A. 9). He further testified that as he started down the ramp, he was travelling about 5-7 miles per hour and that at the time of the collision with the wall, he was travelling about 5 miles per hour (J.A. 9). After striking the wall and while proceeding towards the point of collision with the Mercury automobile, he was travelling about 5 miles per hour (J.A. 10). When he struck Appellant's car, he was travelling about 5 miles per hour.

On cross-examination, Mr. Blow testified that the attendant who had taken Appellee's car from the ground floor to the third floor would have driven it in a semi-circular fashion until he arrived at a point in the vicinity of stall #302 and then would have backed the automobile into that stall (J.A. 11). There were ten floors within the garage and three ramps for up and down traffic (J.A. 11, 12).

Each floor in the garage would hold 70-75 automobiles (J.A. 12). The wall which he struck against was a solid wall and constituted one side of the building and the collision with that wall was nearly head-on (J.A. 12). The witness further testified that in pulling Appellee's automobile from stall #302, he brought it to a complete stop on the level surface, at which time the brakes worked properly (J.A. 12, 13). He then had to turn the automobile to approach the ramp. He then started down the ramp and, because of the oncoming automobile which was being taken up the ramp, he had to stop on a steep decline, which was between the second and third floor (J.A. 13). He stopped the Appellee's car and backed it up to the third floor to permit the other car to pass and then again started down the ramp (J.A. 13).

On redirect examination by Appellants Foster's counsel, the witness testified that the brakes first failed as he approached the second floor and he admitted that there was nothing to prevent him from turning off the ramp onto the second floor at that time (J.A. 13, 14).

Donald F. Miller testified on behalf of Appellant, that Appellee's automobile was brought to his place of business for an estimate on Saturday, November 12, but that he did not examine the brakes of that vehicle on that date but that he did on the following Monday. The witness, an automobile mechanic, described, generally, the presence of brakes on all four wheels of a vehicle, as well as asbestos lining on the metal brake shoes. Initially, when questioned with respect to the lining on the brakes of Appellee's vehicle, the witness testified that he did not believe there was any lining on the particular wheel he looked at (J.A. 16). When questioned with respect to the brakes on Appellee's vehicle, the following appears of record:

Q. Now, these brakes will still actually operate just on the drum and brake shoe, isn't that correct? A. Right.

Q. But you have to step almost to the floor in that regard? A. Right. (J.A. 13)

Again, Appellants Foster's counsel questioned his witness:

Q. Assuming that this vehicle was being driven down a ramp, a slightly tilting ramp approximately the way my hand is, like so, down a ramp at a rate of some five to seven miles per hour, could brakes under such a condition still hold? A. Well, yes. You just have to apply more pressure and — in other words, it is just like you start down a hill, and you need more pressure to stop than you do on level ground. (J.A. 18)

On cross-examination by counsel for Kinney of D. C., Inc., the witness testified that he had looked only at the front wheels. He did not recall looking at the rear wheels (J.A. 19). On cross-examination by Appellee's counsel, it was developed, though the witness did indicate that brakes, as described, could be subject to intermittent brake failure, he readily conceded that he would have to be told what is meant by the term brake failure (J.A. 19). Further, the speed at which the vehicle was being driven would have a great deal of bearing upon his opinion and he readily conceded knowledge of many instances of rear-end collisions where the operator contended the brakes had failed when, in fact, the brakes on the vehicle were in operating condition (J.A. 19). The witness further testified that the opinions expressed by him were predicated upon visual observations of the front end of the vehicle alone, *i.e.*, the drums and the four brake shoes on each

of the two front drums (J.A. 20). The witness definitely testified that if the vehicle of Appellee had been driven at a speed of 5-7 miles per hour, the car had adequate brake facilities to stop the vehicle (J.A. 20). Stopping power of the vehicle would be measured in terms of the speed (miles per hour) (J.A. 21).

On cross-examination of Appellant O'Donoghue by counsel for Appellee herein (erroneously indicated in the Joint Appendix as cross-examination by counsel for Kinney of D. C., Inc.), she testified that she saw Appellee at the scene of the accident and that she also observed his 1957 Pontiac at the scene after the accident (J.A. 21). In fact, she indicated that a portion of Appellee's vehicle was against a portion of her car (J.A. 22). Following the accident, she saw an employee of Kinney of D. C., Inc. get into Appellee's car and drive it on the level of the first floor; she saw him back up the automobile and bring it to a stop and saw him drive it forward, apply the brakes and bring it to a stop. She also saw him drive the automobile down a ramp towards a lower level. This employee was obviously checking the brakes on Appellee's vehicle and, from her observation, the vehicle came to a stop on each occasion it was tested (J.A. 22).[1]

After the Court had directed a verdict in favor of Appellee in Appellant's case, the then-remaining Defendant, presenting its evidence on its crossclaim, called Appellee as a witness and briefly inquired of Appellee. Counsel for Appellant, O'Donoghue, began

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[1] This employee of Kinney, likewise referred to in the testimony of Appellee, was otherwise unidentified and was not produced for testimony at trial.

cross-examination but, desiring to exceed the scope of direct examination, then made Appellee a rebuttal witness on behalf of Appellant, O'Donoghue.

The Appellee testified that his residence was located about fifteen miles from Washington and that he had travelled to Washington on the day of this occurrence, arriving about 10:00 A.M.; that traffic was quite heavy at the time. During the course of this approximately fifteen-mile journey, he was required to stop his automobile for 15-20 traffic lights between Falls Church and downtown Washington; that he had occasion to apply his brakes and bring his car to a complete stop and did so and that the brakes were operating normally (J.A. 23, 24). The witness further testified that there was no screeching or unusual noise associated with the application of the brakes, nor any indication to him that there was anything wrong with the brakes. Follwoing the happening of the accident, the Appellee described observing within the garage, an employee of Kinney of D. C., Inc. get into his automobile, "stop and accelerate and accelerate at a fairly rapid speed, apply the brakes and all four wheels locked, leaving skid marks on the concrete inside of the garage." (J.A. 24) In addition, the same Kinney employee drove the automobile down another ramp from the ground level to the basement "and at the bottom of that ramp, there is a block wall and he applied the brakes and stopped the car without hitting the wall." Subsequently, Appellee drove his automobile from the garage to Falls Church. He had occasion to stop the vehicle on the way home and did not encounter any difficulty in applying the brakes (J.A. 24, 25). In response to the direct question as to his knowledge of the condition of the brakes, he denied any knowledge of the brakes being defective or worn (J.A. 25).

SUMMARY OF ARGUMENT

1. The evidence did not establish that Appellee, Crawford, knew or, in the exercise of reasonable care, should have known of the alleged defect in his braking system.

2. The Appellant did not establish that the alleged brake failure of the Crawford vehicle was the proximate cause of the accident but, on the contrary, did establish that the proximate cause of the accident was the negligent operation of the vehicle by the parking lot attendant.

ARGUMENT

I.

At the outset, it is Appellee's position that consideration of the over-all evidence in this case did not establish the existence of a defect in the braking system of the vehicle of Appellee. Though it is true that the garage attendant claimed that the brakes of the vehicle had failed, this was the single item submitted by Appellant to establish such a contention, *i.e.*, with regard to the condition of the brakes at the time and place of the accident. The examination of the front wheels of the vehicle, made several days thereafter by the mechanic-witness, Miller, injected nothing more than an opportunity for speculation in the case. Opposed to the claim of the garage attendant was testimony of Appellant, O'Donoghue, and Appellee, Crawford, as to tests made on the car immediately following the accident and the sufficiency of the brakes to stop the vehicle

on a level surface and on a downgrade surface. Also opposed to the claim of the garage attendant was his own incredible story as to how he operated this vehicle in attempting to bring it down from the third floor to the first floor level. Consequently, Appellee basically urges the insufficiency of proof to establish the existence of an alleged brake defect in his vehicle at the time and place of the accident.

Assuming, however, for the purposes of argument herein, that the brakes on Appellee's vehicle could be characterized as defective, then Appellee urges that the evidence did not establish that he knew or, in the exercise of reasonable care, should have known of the alleged defect in his braking system.

The parties to this appeal are apparently in agreement that Appellee's liability, if any, must be predicated upon his knowledge, either actual or constructive, of a defective condition respecting the braking system of the automobile. This position is in accord with the great weight of authority. See 8 *Am. Jur.* 2d, Automobiles and Highway Traffic, §700; *Annotation*, 170 A.L.R. 615, 619 and 667; *Annotation*, 46 A.L.R. 2d 427, 428; *Ravin v. Hanson*, 142 A.2d 830; *Boyd v. Reed*, 143 A.2d 516; *Knox v. Akowskey*, 116 A.2d 406; *Kaplan v. Stein*, 84 A.2d 81.

There is no evidence whatsoever that the Crawford vehicle had a history of brake malfunction or indeed, that there had ever been a single instance of the brakes failing to operate properly.

In referring to the day of the occurrence, Appellee, Crawford, testified on direct examination by Appellant, O'Donoghue, that he had driven from his home in Falls Church to the garage on 11th

Street, where the accident occurred, a distance of about fifteen miles, through heavy traffic and had passed "15-20" stoplights and that, in the course of this trip, he had had occasion to apply his brakes and to bring his car to a complete stop; and that on these occasions the brakes operated normally and without any unusual noise. He stated that as far as he knew, there was no indication of anything wrong with the brakes.

The employee of the parking lot, Mr. Charles Blow, said that when he first got into the Crawford automobile, it had good brakes and that in bringing the car down from the third level, he met another car coming up, necessitating his having to stop the Crawford vehicle on a decline and back it up. There was no indication that the attendant who parked the Crawford vehicle had experienced any difficulty with the brakes.

From this testimony, it is apparent that if the brakes on the Crawford vehicle did, in fact, fail to function properly, it was an isolated instance, and one which Appellee, Crawford, could not have reasonably been expected to anticipate.

The cases cited above add strong support to Appellee's contention that for a Plaintiff to prevail in this jurisdiction on the issue of notice, or constructive notice, he must present stronger evidence than that produced by Appellant in the trial of this case.

II.

The Appellant did not establish that the alleged brake failure of the Crawford vehicle was the proximate cause of the accident. On the contrary, the evidence established that the proximate cause

of the accident was the negligent operation of the vehicle by the parking lot attendant.

The evidence alluded to above clearly demonstrates that there was no prior indication of trouble with the brakes on the Crawford vehicle. There is uncontradicted testimony that immediately following the accident, the brakes were tested and performed satisfactorily. In this regard, Appellant, O'Donoghue, stated that following the accident, she saw an employee of the parking garage drive the car forward and obviously apply the brakes and bring the car to a stop. This was corroborated by the testimony of Appellee, Crawford, to the effect that he saw an employee of Kinney get into his car, accelerate at a fairly rapid speed and apply the brakes, at which time all four wheels locked, leaving skid marks on the concrete.

An automobile mechanic, called by Appellants Foster, testified, on cross-examination, that if the automobile had been operated at a slow rate of speed, it had adequate brake facilities to bring the car to a stop.

His recollection was that he examined both front wheels and that he did not "believe there was any lining on the particular wheel that I looked at." He then proceeded to testify, in general terms, as to indicia to the operator of a vehicle on which the brakes were worn. There would be, he said, a rasping sound and "the pedal goes further down as you apply it." However, this witness had fifteen years experience with regard to automobile brakes and to suggest that these "indicia" would have any significant meaning to the average motorist is pure speculation.

The suggestion that the vehicle was not being operated at a reasonable rate of speed is further supported by the testimony of Appellant, Frosene Foster, that when she first saw the Crawford vehicle, it was coming down fast — travelling much faster than 5-7 miles per hour. It should be remembered that she did not see the Crawford vehicle until after it had struck a wall and another automobile. The parking lot attendant gave testimony that he drove "almost straight" into the wall, but bounced off and proceeded to strike a Mercury vehicle on the right front fender. It is difficult to comprehend how the Crawford vehicle could have continued on its journey and inflicted heavy damage after coming into contact with these two stationary objects, had it been operated at only a moderate rate of speed.

The attendant, Mr. Blow, also testified that the brakes failed as he was approaching the second floor and that there was nothing to prevent his going off the ramp onto the second floor at that time. However, the attendant, Mr. Blow, did not go off the ramp but, instead, continued down to the first level. There is no evidence that he, after realizing that the brakes failed, made any attempt to stop the Crawford automobile by utilizing the emergency brake.

The incredible version of this occurrence, as presented by the employee of Kinney of D. C., Inc., in and of itself compels the conclusion that it was speed, rather than a lack of braking power, that caused the accident. The Trial Judge was apparently convinced of this by that testimony, the physical facts, and the failure of anyone on behalf of Appellant or Kinney of D. C., Inc. to deny the testimony of Mrs. O'Donoghue and Captain Crawford, that his vehicle was tested after the collision and the brakes were found to be

satisfactory. The Trial Judge was not obliged to automatically accept a contention on an issue of fact. See *Washington, Marlboro & Annapolis Transit Co. v. Maske*, 89 U. S. App. D. C. 36, 190 F.2d 621.

The law is well settled in this jurisdiction that when a Plaintiff produces evidence that is consistent with an hypothesis that the Defendant is not negligent and, also, with one that he is, his proof tends to establish neither. *Capital Transit v. Gamble*, 82 U. S. App. D. C. 57, 160 F.2d 283; *Safeway Stores, Inc. v. Preston*, 106 U. S. App. D. C. 114, 269 F.2d 781. In the case of *Selby v. S. Kann Sons*, 64 App. D. C. 36, 73 F.2d 853, it was held that, where under Plaintiff's evidence an accident may be due to any one of several causes, for some of which the Defendant is legally responsible, and for some of which he is not, Defendant is entitled to a directed verdict.

In a case involving a similar fact situation, the Municipal Court of Appeals held that the trial Court was entitled to believe Plaintiff's testimony that his foot brake was in working order when he delivered the automobile to the garage, or at least, he believed it to be in working order, and was further entitled to take into consideration the natural inclination of a parking attendant to exculpate himself when weighing his testimony. *Columbia v. Kettler*, 67 A.2d, 267. In that case, there was undisputed evidence that following the accident, the foot brake would not work.

Even if we assume that the brakes on the Crawford vehicle did malfunction, the negligence of the attendant was the proximate cause of the collision and constituted an intervening agency that could not reasonably have been anticipated by the Appellee. See *Ravin v.*

Hanson, supra. This negligence consisted of operating the automobile at an excessive rate of speed, failing to drive the vehicle off the ramp at the second level when there was an opportunity to do so and thereby avoid the collision and in failing to apply the emergency brake.

This contention is supported by the jury verdict rendered in the later trial in which Appellants, Foster and O'Donoghue, were Plaintiffs and the parking garage was the Defendant, and which arose from the same occurrence that is the basis of this suit. In that later trial, a jury, after hearing all the evidence on both sides, rendered a verdict in favor of Foster and O'Donoghue against the parking garage. Therefore, it is to be assumed that that jury was convinced that the parking attendant was negligent and that his negligence was the proximate cause of the accident.

It is significant to observe that in the appeals taken by Kinney of D. C., Inc. from these jury verdicts against it (Nos. 21,006 and 21,007), that Appellant, Kinney of D. C., Inc., apparently recognizes its liability to Appellants, Foster and O'Donoghue, for there is no contention made that the trial Court should have directed a verdict in favor of Appellant, Kinney of D. C., Inc. The points on appeal in those causes are purely evidentiary.

CONCLUSION

It is respectfully submitted that the trial Court correctly ruled upon Appellee's motion and, thus, avoided affording a jury an opportunity to speculate with respect to non-existent evidence. The trial Court should be affirmed.

Respectfully submitted,

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